# Exhibit 10

	Page 1	
	UNITED STATES DISTRICT COURT	
	SOUTHERN DISTRICT OF NEW YORK	
	:	
	IN RE NAMENDA DIRECT PURCHASER :	
	:No. 15-cv-7488-CM-JCF	
	ANTITRUST LITIGATION :	
	:	
	Washington, D.C.	
	Wednesday, October 18, 2017	
	***CONFIDENTIAL***	
	Videotaped Deposition of:	
	RODERICK McKELVIE,	
called for oral examination by counsel for		
	Plaintiff, pursuant to notice, at the office of	
	White & Case, LLP, 701 13th Street, N.W., before	
	SUSAN L. CIMINELLI, CRR, RPR, of Veritext Legal	
	Solutions, a Notary Public in and for the District	
	of Columbia, beginning at 9:06 a.m., when were	
	present on behalf of the respective parties:	

# Case 1:15-cv-07488-CM-RWL Document 501-3 Filed 01/18/18 Page 3 of 12

# CONFIDENTIAL

Page 2	Page 4
1 APPEARANCES	1 McKELVIE DEPOSITION EXHIBITS: PAGE
2 On behalf of Plaintiff: 3 RUSSELL A. CHORUSH, ESQUIRE	
Heim, Payne & Chorush, LLP	,
4 Heritage Plaza 1111 Bagby	3 Exhibit 14 LexisNexis Manchack 98-1530 215
5 Suite 2100	4 Exhibit 15 LexisNexis The Johns Hopkins
Houston, Texas 77002	5 University v. CellPro 217
6 (713) 221-2000 rchorush@hpllp.com	6 Exhibit 16 Order AbbVie No. 14-5151 220
7	7 Exhibit 17 Memorandum FTC v. AbbVie 222
On behalf of Defendants:	
RYAN P. JOHNSON, ESQUIRE	8 Exhibit 18 FTC v. AbbVie Memorandum in Support of
9 White & Case, LLP 1221 Avenue of the Americas	9 Plaintiff 223
New York, New York 10020-1095	10 Exhibit 19 LexisNexis Merck Sharp & Dohme 227
(212) 819-8893	11 Exhibit 20 LexisNexis In re Copaxone Consolidated 230
11 rjohnson@whitecase.com 12 -and-	12 Exhibit 21 LexisNexis Aventis Pharma v. Hospira 232
13 ERICA R. SUTTER, ESQUIRE	13 Exhibit 22 LexisNexis Santarus v. Par 234
White & Case, LLP 14 3000 El Camino Real	
Five Palo Alto Square	14 Exhibit 23 LexisNexis AbbVie v. Hospira 236
15 9th Floor Palo Alto, California 94306-2109	15 Exhibit 24 LexisNexis Tris Pharma, Inc. v. Actavis 238
16 (650) 213-0338	16 Exhibit 25 LexisNexis Allergan v. Watson 239
erica.sutter@whitecase.com	17 Exhibit 26 LexisNexis Pliva v. Gladys Mensing 245
ALSO PRESENT:	18
18	19 (Exhibits attached to transcript.)
PATRICK GRAHAM, Video Technician  19	* '
* * * *	20
20 21	21
22	22
Page 3	Page 5
1 CONTENTS	1 PROCEEDINGS
	I ROCEEDINGS
2 RODERICK McKELVIE	
	2 VIDEO TECHNICIAN: Good morning. We are
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1 reporter please swear in the witness?

2 Whereupon,

3 RODERICK McKELVIE,

4 was called as a witness by counsel for Plaintiff,

5 and having been duly sworn, was examined and

6 testified as follows:

7 EXAMINATION BY COUNSEL FOR PLAINTIFF

8 BY MR. CHORUSH:

9 Q. Good morning. Please state your full

10 name?

11 A. Roderick Radcliff McKelvie.

12

15 Q. Do you understand that your testimony

16 today is being given under oath?

17 A. Yes.

18 Q. Do you understand that the oath that

19 you've taken today at this deposition is just as

20 solemn as the oath that you would take if testifying

21 at trial?

22 A. I do.

Page 7

1 Q. Do you understand that your testimony can

2 be used at trial?

3 A. I assume so.

4 Q. Is there any reason why you cannot --

5 strike that.

6 Is there any reason that you cannot

7 testify fully and accurately today?

8 A. Not that I know of.

9 Q. I'll be happy to provide you breaks

10 throughout the course of the deposition. I would

11 just request that you let me know a few minutes

12 ahead of time, so that I can wrap up the line of

13 questioning that I'm on.

14 A. That's fine.

15 Q. Thank you.

16 (McKelvie Exhibit No. 1 was

17 marked for identification.)

18 BY MR. CHORUSH:

19 Q. I've placed in front of you the McKelvie

20 report marke8d as Exhibit 1 to this deposition. Do

21 you see that?

22 A. I do.

Page 6 1 Q. Is Exhibit 1 a true and correct copy of

2 the expert report that you submitted in this case?

3 A. It appears to be.

4 MR. JOHNSON: Take your time if you need

Page 8

5 to, to check things like that.

6 THE WITNESS: It appears to have all the

7 pages.

8 BY MR. CHORUSH:

9 Q. On page 39 is a signature. Is that your

10 signature?

11 A. It is.

12 Q. I plan to refer to Exhibit 1 as your

13 report or the McKelvie report. Is that acceptable

14 to you?

15 A. That's fine.

16 Q. Which attorneys for Forest have you

17 interacted with in connection with your work in this

18 matter?

19 A. Erica and Ryan only.

20 Q. You're referring to Erica Sutter, is that

21 correct?

22 A. Correct. Ryan Johnson.

1 Q. How much time have you spent preparing

2 your report and preparing to give your deposition

3 today?

4 A. A little over 130 hours.

5 Q. Who wrote your report?

6 A. I wrote my first draft of the report, and

7 then I worked with counsel in improving it.

8 Q. I will refer to Forest Laboratories, Inc.

9 as Forest. Is that acceptable to you?

10 A. Yes, that's fine.

11 Q. I will refer to Mylan Pharmaceuticals,

12 Inc. as Mylan. Is that acceptable to you?

13 A. Yes, that's fine.

14 Q. In 2008, Forest filed patent infringement

15 lawsuits against Mylan and a number of other

16 generics, alleging infringement of United States

17 Patent Number 5,061,703, correct?

18 A. Correct.

19 Q. If I refer to United States Patent Number

20 5,061,703 as the '703 patent, will you understand

21 me?

22 A. Yes.

CONFIDENTIAL Page 66 Page 68 1 A. Yes. 2 Q. Is it common, in your experience, for a 3 patent attorney to provide the client with the 4 attorney's assessment of the likelihood of success 5 in patent infringement litigation? 6 BY MR. CHORUSH: A. Yes. Q. And when you say, no, I can't tell if you Q. In your opinion, does experience with 8 patent litigation provide patent attorneys with any 8 were agreeing with me, or disagreeing with me. Did 9 specialized knowledge from which to evaluate 9 you offer any opinion in your report that the time 10 frame for an appellate decision from the Federal 10 likelihood of success in patent infringement cases? 11 11 Circuit would be longer than 12 months? A. It does. 12 A. The whole process I said could be as late Q. One of the factors patent attorneys 12 13 as October of 2012. 13 consider in advising a client on whether or not to 14 settle a patent infringement case is the time and Q. To get to an exhaustion of all appeals, 15 correct? 15 expense it will take to reach a resolution of the 16 A. Right. 16 litigation if the case does not settle, correct? 17 A. Did you say it was clients or lawyers? 17 Q. I'm talking about the time when a Federal 18 Circuit decision would be issued. 18 Q. One of the factors that the patent 19 A. Well, it would be a number of months 19 attorney considers in advising the client on whether 20 short of October 2012. It could be April 2012. As 20 or not to settle is the time and expense it will 21 I said, approximately 12 months. 21 take to reach a resolution of the litigation if the 22 MR. CHORUSH: We've been going about an 22 case doesn't settle? Page 67 Page 69 1 MR. JOHNSON: Objection to form. 1 hour. 2 THE WITNESS: It's my experience --2 MR. JOHNSON: I was just going to say 3 that. 3 MR. JOHNSON: Objection, outside the 4 4 scope. MR. CHORUSH: Yeah, it's up to you. 5 5 MR. JOHNSON: I'm personally game for a THE WITNESS: My experience is this is 6 break. 6 something that mainly comes from the client, as 7 7 opposed to the lawyer. The client asks the lawyer MR. CHORUSH: Okay, sounds good. VIDEO TECHNICIAN: We are off the record 8 advice about time and expense. 9 at 10:07. 9 BY MR. CHORUSH: 10 10 Q. Do patent lawyers typically provide that VIDEO TECHNICIAN: We are back on record 11 type of advice? 11 12 at 10:20. 12 A. They try to. 13 BY MR. CHORUSH: 13 Q. Does experience with patent litigation 14 provide patent attorneys with specialized knowledge

Q. One of the factors that patent attorneys

15 consider in advising clients on whether or not to

16 settle a patent infringement case is likelihood of

17 success, correct?

18 A. Yes.

19 Q. Is it common, in your experience, for

20 clients to seek their attorney's advice, in terms of

21 evaluating likelihood of success in patent

22 litigation?

16 in patent infringement litigation? 17 MR. JOHNSON: Objection.

18 THE WITNESS: It can.

19 BY MR. CHORUSH:

20

Q. Do you agree that early in a patent 21 infringement lawsuit, statistical studies can be a

15 from which to evaluate the likely costs and timing

22 helpful tool for patent attorneys in getting a

18 (Pages 66 - 69)



Page 78

- 6 Q. If the Court ultimately finds that any of
- 7 the accused infringer's validity defenses have been
- 8 established, the accused infringer wins, correct?
- 9 A. If the patent is found invalid, yes.
- 10 Q. So the accused infringer can win a
- 11 lawsuit by prevailing on non-infringement or any
- 12 invalidity defense, correct?
- 13 A. Correct.
- 14 Q. Do you agree that patent owners sometimes
- 15 push the envelope in patent litigation by relying on
- 16 an unrealistic scope for their patent claims?
- 17 A. It happens, yes.
- 18 Q. Do you agree that patent owners sometimes
- 19 litigate based on what they wish the patent claims
- 20 had said, rather than what the patent claims
- 21 actually say?
- A. I don't know.

Q. You know Mark Lemley personally, correct?

Page 80

Page 81

- 2 A. I do.
- 3 Q. In fact, you've known him since the
- 4 1990s, correct?
- 5 A. I have.
- 6 Q. You hold Mr. Lemley in high regard,
- 7 correct?
- 8 A. I do.
- 9 Q. He is a professor at Stanford Law School,
- 10 is that correct?
- 11 A. Yes.
- 12 Q. Stanford Law School is a very prestigious
- 13 law school, correct?
- 14 A. It is.
- 15 Q. You're aware that in addition to serving
- 16 as a professor at Stanford Law School, he's also a
- 17 patent litigator, correct?
- 18 A. Correct.
- 19 Q. And you understand that the Lemley Where
- 20 to File article studies the historical rates of
- 21 success in patent infringement litigation, based on
- 22 the district in which are the litigation was

Page 79

- MR. JOHNSON: Objection, outside the
- 2 scope.

1

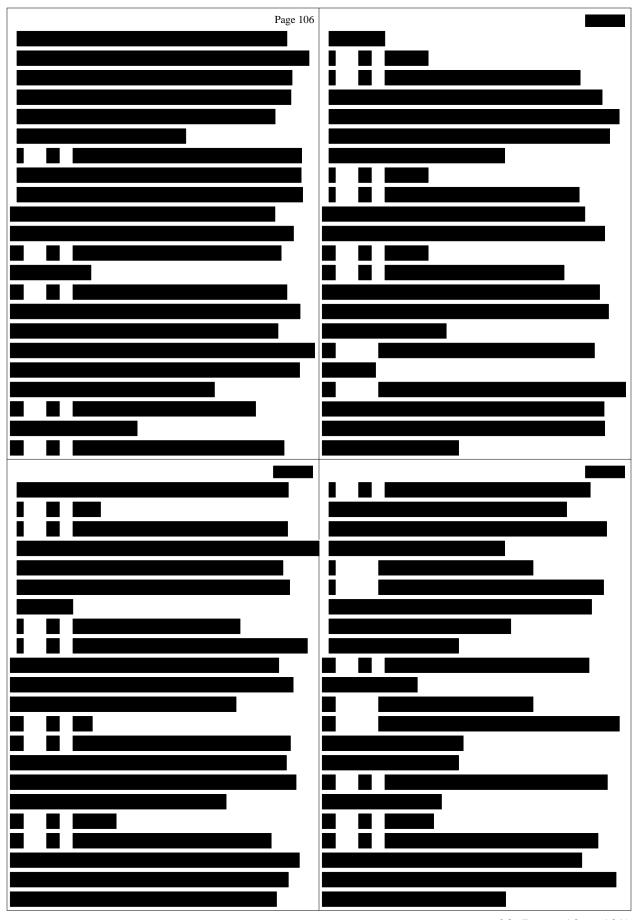
- 3 THE WITNESS: I don't know about that.
- 4 one way or the other. I mean, we can project into
- 5 that certain conclusions, but I can't say that I've
- 6 ever been involved in a case where that necessarily
- 7 happened.
- 8 (McKelvie Exhibit No. 4 was
- 9 marked for identification.)
- 10 BY MR. CHORUSH:
- 11 Q. I'm going to hand you what has been
- 12 marked as McKelvie Exhibit 4. Exhibit 4 is an
- 13 article by Mark Lemley titled, Where to File Your
- 14 Patent Case, correct?
- 15 A. Correct.
- 16 Q. If I refer to this article as the Lemley
- 17 Where to File article, is that acceptable to you?
- 18 A. Yes.
- 19 Q. The Lemley Where to File article is a
- 20 document you reviewed in preparing your expert
- 21 report, correct?
- 22 A. I did.

1 conducted, correct?

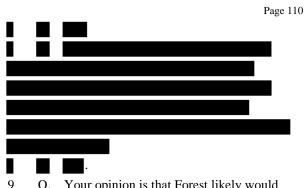
- 2 A. Correct.
- 3 Q. And would you please turn to page 8 of
- 4 the Lemley Where to File article.
- 5 A. Yes.
- 6 Q. Just above table 3 is a sentence that
- 7 reads, "even among these districts, the patentee win
- 8 rate varies substantially. Table 3 sorts the top 33
- 9 districts by patentee win rate." Do you see that?
- 10 A. Yes.
- 11 Q. Patentee is another word for patent
- 12 owner, correct?
- 13 A. Yes.
- O. The title of table 3 is Patentee Win Rate
- 15 in Districts With 25 Or More Outcomes, is that
- 16 correct?
- 17 A. Correct.



21 (Pages 78 - 81)



28 (Pages 106 - 109)



- Q. Your opinion is that Forest likely would
- 10 have prevailed on infringement, correct?
- 11 A. Yes.
- 12 Q. What does likelihood mean in terms of a
- 13 numerical percentage?
- 14 MR. JOHNSON: Objection.
- 15 THE WITNESS: More probable than not.
- 16 BY MR. CHORUSH:
- Q. Okay. So greater than 50 percent, 17
- 18 correct?
- 19 A. At least.
- 20 Q. Now, does likely mean 100 percent?
- 21 A. Nope.
- 22 Q. Okay. What's the range? You've told me

- 1 that likely means greater than 50 percent, but below
- 2 what?
- 3 A. Just likely. You speak French. I speak
- 4 German.
- Q. Okay. So when the jury hears you say
- 6 that Forest was likely to win the Namenda patent
- 7 litigation, it should understand that to mean
- 8 something above 50 percent, correct?
- MR. JOHNSON: Objection. 9
- 10 THE WITNESS: Yes.
- 11 BY MR. CHORUSH:
- Q. But you're not setting any sort of an
- 13 upper limit for what that number could be, just --
- A. There is no value to it. What's a client
- 15 going to do, sleep better? Because you say 76
- 16 percent versus 75 percent?
- Q. Well, you've already told us that no
- 18 patent litigator offers a number like 80 percent,
- 19 correct?
- 20 A. Correct.
- 21 Q. So when you say likely -- strike that.
- 22 When you say Forest likely would have

1 prevailed on infringement, do you mean something

Page 112

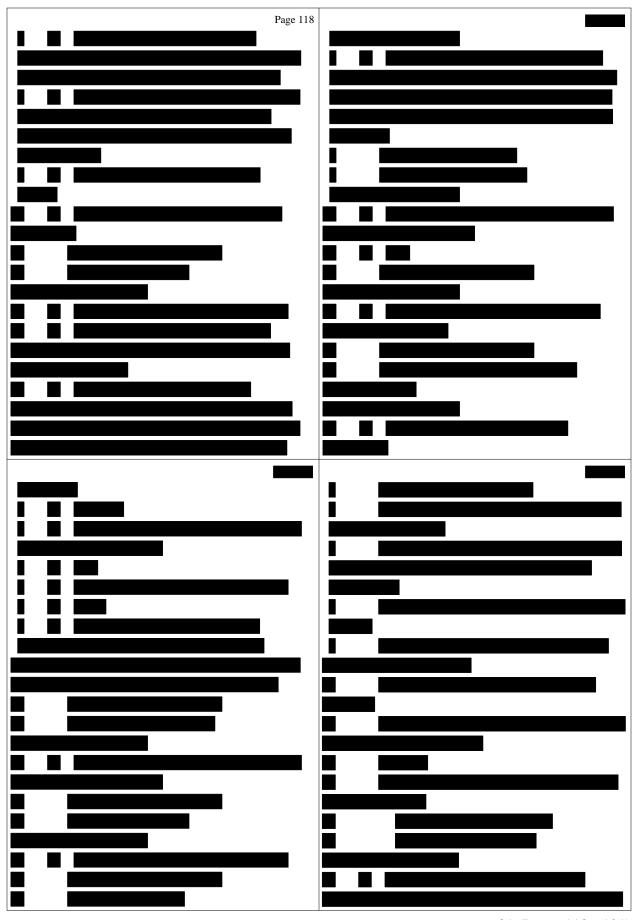
- 2 between 51 percent and 80 percent?
- A. I mean likely. I don't think percentages 4 are helpful.
- Q. Well, but you just put a lower bound on
- 6 the number by saying greater than 50 percent,
- 7 correct?
- 8 A. It's likely. I wouldn't say 50 percent
- 9 to a client. Because I don't think numbers are
- 10 helpful.
- 11 Q. Okay. So for purposes of interpreting
- 12 your usage of the term likely, the jury should
- 13 simply understand it to mean greater than 50
- 14 percent, correct?
- 15 MR. JOHNSON: Objection.
- 16 THE WITNESS: It just means likely.
- 17 BY MR. CHORUSH:



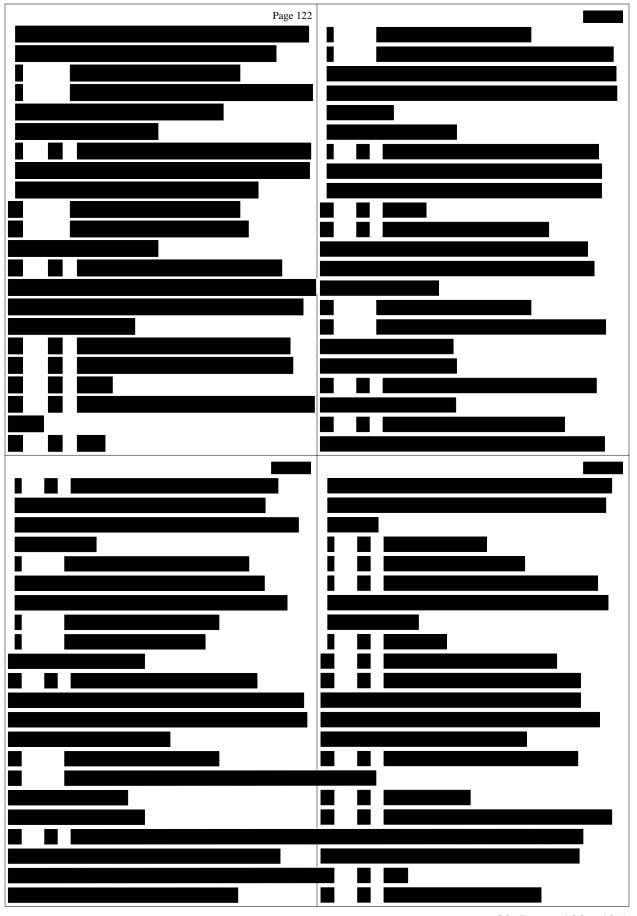
29 (Pages 110 - 113)



(Pages 114 - 117)



31 (Pages 118 - 121)



32 (Pages 122 - 125)